

COLM A. MORAN (Cal. Bar No. 202685)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
Telephone: (310) 785-4600
Facsimile: (310) 785-4601
colm.moran@hoganlovells.com

Attorneys for Respondent
JAGUAR LAND ROVER NORTH
AMERICA, LLC

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

CALIFORNIA NEW CAR DEALERS
ASSOCIATION

Protestant,

v.

JAGUAR LAND ROVER NORTH
AMERICA, LLC,

Respondent.

Protest No. PR-2463-16

**RESPONDENT'S PROPOSED FINDINGS
OF FACT AND DECISION**

Pursuant to the Order Establishing Post-Hearing Briefing Schedule, Respondent Jaguar Land Rover North America, LLC (“Respondent” or “JLRNA”) hereby submits its Proposed Findings of Fact and Decision in the above-captioned matter.

I. PROCEDURAL BACKGROUND

A. Statement of the Case

1. On February 9, 2016, Protestant California New Car Dealers Association (“Protestant”) filed a protest in this matter pursuant to Vehicle Code § 3085 alleging that Respondent’s Amended Export Policy (the “Policy”) violates Vehicle Code § 11713.3(y).

2. The hearing on merits began on April 8, 2016, at which time the parties agreed to resume the hearing at a later date. On January 9 and 10, 2017, a merits hearing was resumed in this matter before Administrative Law Judge Diana Woodward Hagle.

B. Parties and Counsel

3. Protestant is an association representing California new automobile dealers. Protestant is represented by Halbert B. Rasmussen and Franjo M. Dolenac of Arent Fox, LLP.

4. Respondent is the sole authorized distributor of new Jaguar and Land Rover vehicles, parts and accessories in the United States. Respondent is represented by Colm A. Moran of Hogan Lovells US LLP.

C. Summary of Witnesses’ Testimony and Exhibits Introduced

5. Respondent called the following witnesses: Brian Maas, President of Protestant, Andrew Polsinelli, National Sales Operations Manager for Respondent, and expert witness Alan Skobin, Vice-President and General Counsel of Galpin Motors.

6. Respondent called the following witnesses: Andrew Polsinelli and Michael Stern, Audit Manager for Respondent.

7. Respondent filed a motion in limine seeking to exclude any opinion testimony offered by Mr. Skobin to the extent such testimony constituted a legal opinion. Respondent’s motion was denied.

8. Eight exhibits were admitted into evidence: Exs. J-1, J-2, J-4, J-6, J-10, J-14, J-20, and portions of R-211.

1 **II. ISSUES PRESENTED**

2 9. Whether the Policy violates Vehicle Code § 11713.3(y)(1).

3 10. Whether the Policy violates Vehicle Code § 11713.3(y)(2).

4 11. Whether the Policy violates Vehicle Code § 11713.3(y)(3).

5 **III. PROTESTANT'S CONTENTIONS**

6 12. Protestant contends that the Policy violates Vehicle Code § 11713.3(y)(1), (2), and
7 (3).

8 **IV. RESPONDENT'S CONTENTIONS**

9 13. Respondent contends that the Policy does not violate Vehicle Code §
10 11713.3(y)(1) or (2) and that, in any event, Protestant has not carried its burden of proof in this
11 matter. As noted below, Respondent has agreed to amend the Policy to include the language
12 specified in Vehicle Code § 11713.3(y)(3).

13 **V. FINDINGS OF FACT**

14 **A. Stipulations**

15 14. The parties stipulated that Protestant has standing to bring the protest in this matter
16 pursuant to Vehicle Code § 3085. (Reporter's Transcript ("RT") Vol. 1, 12:23-13:10).

17 15. Respondent has agreed to amend the Policy to include the language specified in
18 Vehicle Code § 11713.3(y)(3). (RT Vol. 1, 41:6-41:16).

19 16. The parties have agreed that both Respondent and its dealers are harmed by the
20 exporting of vehicles from the United States, but that neither the parties nor the ALJ need
21 quantify the exact amount of such damage. (RT Vol. 1, 129:7-130:19).

22 **B. JLRNA'S Export Policy**

23 17. The Policy was released to JLRNA's dealers on December 10, 2015 following the
24 passage of Assembly Bill 1178 on October 6, 2015. (Exs. J-1 and R-211; RT Vol. 1, 89:16-90:3).

25 18. The Policy provides, among other things, that: (1) a dealer exceeding its quarterly
26 export threshold of 3% of sales volume (for dealers at or above 250 annual vehicle sales) or 2
27 sales per quarter (for dealers below 250 annual vehicle sales) may be subject to a sales incentive
28 audit of 25-35% of its sales transactions in the applicable period; and (2) dealers who are shown

1 to have violated the policy after an audit are subject to various penalties, including a chargeback
2 of all incentives paid to the dealer by JLRNA for such vehicle and certain penalties related to the
3 allocation of future vehicles to the dealer. (Ex. J-1).

4 19. JLRNA chose the 3% threshold by reviewing other industry export policies and
5 determining that a 3% threshold is “typical of the luxury industry.” (RT Vol. 1, 123:22-124:09).

6 20. The 3% threshold is also reasonable in practice as only 17 of the approximately
7 165 Land Rover dealers in the United States exceeded the threshold in the most recent quarter for
8 which data was available at the time of the hearing in this matter. (RT Vol. 2, 38:7-25).

9 21. Under the terms of JLRNA’s prior export policy, a dealer would be automatically
10 subject to chargeback if it exceeded its quarterly export threshold. (Ex. J-1; RT Vol. 1, 64:16-
11 65:12).

12 22. While JLRNA never enforced its prior export policy against any dealer, under the
13 current Policy, as noted above, a dealer who exceeds its quarterly export threshold is not subject
14 to any automatic penalties, but may be subject to an audit in compliance with California law.
15 (Ex. J-1; RT Vol. 1, 64:16-65:12; Vol. 2, 14:9-12).

16 23. The Policy includes “Retailer Due Diligence and Best Practices” that JLRNA
17 recommends, but does not require, dealers to follow in identifying potential exporters (the “Best
18 Practices”). (Ex. J-1; RT Vol. 1, 92:19-93:22).

19 24. Such Best Practices suggest that dealers, among other things, (1) compare the
20 information provided by the customer and/or the leasing agent during the sales process (e.g.,
21 names, addresses, website data, and phone numbers) against various databases like the JLRNA
22 Known Exporter List, other OEM known exporter lists, the JLRNA Sales History List, the
23 Prospect Research Tool (the “PRT Tool”), and Carfax; (2) check with financial institutions to
24 confirm that the funding source matches the end-user customer; and (3) ensure that the
25 information on the title registration and insurance of the new vehicle match the end-user and the
26 information provided by that customer during the sales process. (Ex. J-1).

1 25. The Policy also includes a section titled “Indicators of Potential Export or Broker
2 Behavior,” which lists a number of red flags (the “Red Flags”) that dealers “should recognize as
3 having a high risk for being an export or broker transaction.” (Ex. J-1).

4 26. Red Flags include the customer purchasing a vehicle with a funding source from
5 an unrelated payer or third party; the customer providing; sales information that does not match
6 the registration information on the new vehicle or the end-user. (Ex. J-1).

7 27. The Best Practices and the Red Flags were created at the request of, and in
8 consultation with, JLRNA’s dealers and are intended to apply equally to all persons. (RT Vol. 1,
9 92-19-93:22).

10 28. The Policy specifically states: “The Known Exporter List and the Prospect
11 Research Tool are not intended to, and do not, restrict to whom a vehicle may be sold, which is
12 subject to a retailer’s discretion.” (Ex. J-1).

13 **C. JLRNA Has a Legitimate Business Interest in Seeking to Curb Exporting**

14 29. Protestant’s expert witness – Alan Skobin – testified that dealers should not
15 participate in export activities and that the exporting of vehicles is “detrimental for a lot of
16 reasons, both dealer and a factory and to the end customer.” (RT Vol. 1, 140:11-18).

17 30. There are numerous reasons why JLRNA (and other manufacturers) seek to
18 prevent exports. For example, JLRNA’s national sales operations manager, Andrew Polsinelli,
19 testified that the exporting of vehicles outside the United States (i) undermines JLRNA systems
20 established to ensure that the end user is on record for warranty and safety recall purposes and
21 that customer satisfaction information and demographic data are collected; (ii) negatively impacts
22 U.S. JLRNA dealers by, among other things, removing vehicles from the parts and service
23 business, resulting in lost revenue in anticipated part sales and warranty work; and (iii) may
24 impact future product allocation and vehicle pricing for U.S. retailers. (RT Vol. 1, 87:10-89:15).

25 **D. JLRNA Provides Various Tools to Dealers to Help Identify Exporters**

26 31. JLRNA provides dealers with various tools to help them identify exporters. Mr.
27 Polsinelli described (i) the Known Export List compiled by JLRNA and published to all dealers,
28 which lists customers who are known to have purchased vehicles and exported them from the

1 United States (RT Vol. 1,75:08-75:11); (ii) the PRT Tool, which is a database designed and
2 maintained by JLRNA which enables dealers to identify customers who have recently purchased,
3 for example, multiple Land Rover vehicles at different dealers (which is a significant indicator
4 that the customer may be an exporter) (RT Vol. 1, 91:07-92:10); and (iii) the Best Practices and
5 Red Flags, which dealers are not required to follow and which JLRNA compiled with significant
6 input from dealers, provide dealers with the shared learning of other dealers of ways to identify
7 exporters (RT Vol. 1, 92:11-93:22, 96:19-97:16).

8 **E. JLRNA's Audits Under the Policy are Reasonable and Lawful**

9 32. Under the Policy, a dealer who exceeds its 3% quarterly export threshold is subject
10 to a "Step 2 sales incentive audit." (Ex. J-1).

11 33. Mr. Stern explained that pursuant to JLRNA's Sales Incentive Counseling Process
12 policy, which is published to all Jaguar and Land Rover dealers, a Step 2 audit reviews 25-35% of
13 a dealer's sales files. (Ex. J-4; RT Vol. 2, 10:9-11:12).

14 34. A dealer who exceeds the threshold, however, is not automatically selected for an
15 audit; in fact, not every dealer who exceeds the threshold will be audited as a consequence of
16 exceeding the threshold. (RT Vol. 2, 14:9-12).

17 35. Instead, JLRNA's audit manager, Michael Stern, testified that dealers are selected
18 for an audit after a consideration of various factors that are not limited to issues related to
19 exported vehicles. (Ex. J-4; RT Vol. 2, 13:15-16:24).

20 36. Further, when JLRNA conducts a sales incentive audit, whether or not the dealer
21 has exceeded its export threshold, it reviews 25-35% of the dealer's sales transactions in the
22 applicable audit period. (Ex. J-4; RT Vol. 2, 23:2-5).

23 37. To that end, JLRNA has "established an objective, risk-based approach to identify
24 and select retailers for audits." (Ex. J-4).

25 38. "Specifically, a model has been developed that measures objective criteria in order
26 to rank retailers' potential risk level and noncompliance with" JLRNA incentive programs. (Ex.
27 J-4).

1 39. Mr. Stern testified that there are several reasons for this approach. First, JLRNA
2 has limited audit resources. In particular, JLRNA has only three auditors who conduct sales
3 audits only one of whom is available full-time. (RT Vol. 2, 8:8-19).

4 40. Mr. Stern also testified that JLRNA has approximately 365 Jaguar and Land Rover
5 dealers in the United States and Canada for which his audit team is responsible. (RT Vol. 2, 8:20-
6 9:3).

7 41. Given the number of dealers in its network and the limited size of its audit staff,
8 Mr. Stern explained that JLRNA can only conduct approximately 70-75 sales audits in total each
9 year in the United States and Canada. (RT Vol. 2, 9:4-10).

10 42. Consequently, when a Jaguar or Land Rover retailer is selected for audit, it is
11 JLRNA's policy to conduct a general sales incentive audit regardless of what triggered the audit
12 initially (e.g., an export violation). (RT Vol. 2, 23:2-5).

13 43. Second, given its limited audit resources and limitations on the number of audits it
14 can perform under applicable law, JLRNA's auditors "try to get a representative sample across all
15 the various incentive programs so [JLRNA] can get a comfort level of compliance for the various
16 incentive" programs. (Ex. J-4, RT Vol. 2, 14:9-16:24, 23:6-17).

17 44. Third, even setting aside the resources issue, JLRNA does not limit its audit under
18 the Policy to vehicles that JLRNA knows have been exported because JLRNA cannot reliably
19 identify all vehicles that may have been sold by a particular dealer and later exported. (RT Vol.
20 1, 97:22-98:19, Vol. 2, 37:15-38:17).

21 45. To determine whether a dealer has violated the Policy, therefore, JLRNA must
22 review more than the sales transactions for vehicles it knows have been exported. (RT Vol. 2,
23 38:1-6).

24 46. JLRNA's audit process itself is also reasonable. After identifying a dealer for
25 audit, the dealer will be sent an audit notification letter. (Ex. J-4).

26 47. The assigned JLRNA auditor will then review the dealer's sales transactions to
27 identify a representative sample of sales transactions to audit. (RT Vol. 2, 23:6-17). Once the
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1 JLRNA auditor has identified the sales transactions that will be reviewed, the auditor travels to
2 the dealership to meet with the dealer and conduct the audit. (Ex. J-4; RT Vol. 2, 26:23-29:3).

3 48. After reviewing the relevant sales transactions, the JLRNA auditor will review the
4 findings of the audit with the dealer and the dealer is given an opportunity to appeal JLRNA's
5 findings. (Ex. J-4, RT Vol. 2, 29:4-30:2).

6 49. Mr. Stern explained that JLRNA has conducted a total of four audits in California
7 under the Policy and that JLRNA will not penalize a dealer under the Policy unless there is
8 evidence that the dealer "knew or should have known" the vehicle would be exported at the time
9 of sale. (RT Vol. 2, 43:10-18, 43:21-45:03, 87:21-88:16).

10 50. In fact, Mr. Stern testified that he holds his auditors to an even higher standard;
11 namely, that the auditor must find "tangible" evidence in the form of a "smoking gun" that the
12 dealer knew or should have known the vehicle would be exported at the time of the sale. (RT
13 Vol. 2, 43:21-45:3, 79:4-11, 81:13-82:16).

14 51. JLRNA has not made such a finding regarding any dealer and has not penalized
15 any dealer under the Policy. (RT Vol. 2, 43:10-18, 43:21-45:03, 87:21-88:16).

16 52. The four audits conducted in California did result in the dealers being charged
17 back insignificant amounts. Indeed, the evidence shows that JLRNA paid those dealers a total
18 over \$7 million (\$7,076,264.70) in incentives for the sales subject to audit and charged back the
19 dealers a total of approximately \$18,500 (\$18,564.37) for undisputed violations of JLRNA's
20 incentive program rules, none of which were for violations of the Policy. (Exs. J-6, J-10, J-14, J-
21 20; RT Vol. 2, 41:22-42:8, 42:20-43:9, 45:23-46:21, 53:12-55:21, 56:10-58:12, 62:5-64:23,
22 65:12-67:12).

23 **VI. CONCLUSIONS/ANALYSIS**

24 **A. Whether the Policy Violates Vehicle Code § 11713.3(y)(1).**

25 53. Protestant has not carried its burden to prove that the Policy violates Vehicle Code
26 § 11713.3(y)(1).

27 54. In particular, Vehicle Code § 3065.1(g)(1) permits JLRNA to conduct audits of
28 dealer incentive records on a reasonable basis, and for period of nine months after a claim is paid

1 or credit issued, so long as the dealer is not selected for an audit and the audit is not conducted in
2 a punitive, retaliatory, or unfairly discriminatory manner. The legislature simply could not have
3 intended that JLRNA's exercise of its statutory audit rights under § 3065.1(g)(1) would place it
4 violation of § 11713.3(y)(1).

5 55. Here, JLRNA's audits under the Policy comply with § 3065.1(g)(1). For example,
6 JLRNA's audit manager, Michael Stern, testified that, given JLRNA's limited resources, not all
7 dealers who exceed the export threshold will be audited. Moreover, JLRNA's audits would not
8 be unreasonable even if all dealers who exceed the export threshold were, in fact, audited.
9 JLRNA's national sales operations manager, Andrew Polsinelli, testified that JLRNA's 3% export
10 threshold is standard practice in the luxury automotive industry. Further, Mr. Stern testified that,
11 in the most recent quarter for which data was available, only 17 of 165 Land Rover dealers in the
12 United States exceeded the threshold (i.e., approximately 90% of all Land Rover dealers were
13 below the threshold). Staying below the 3% threshold is, thus, clearly achievable. That fact
14 coupled with the fact that a 3% threshold is industry standard demonstrates that it would be
15 reasonable for JLRNA to audit all dealers who exceed the threshold.

16 56. Additionally, JLRNA has a reasonable basis to audit transactions beyond the
17 "exported VINs." Both Messrs. Polsinelli and Stern testified that JLRNA is unable to accurately
18 capture a complete list of vehicles exported by a particular dealer. To determine whether there
19 are other vehicles that may have been exported, therefore, JLRNA must audit more than simply
20 the "exported VINs" it has identified for a particular dealer to determine if the dealer has violated
21 the Policy and to what extent, if any. Further, owing to the JLRNA's limited audit resources and
22 the fact that § 3065.1(g)(1) limits how often JLRNA may audit a particular dealer, it is entirely
23 reasonable that JLRNA would audit more than "exported VINs" when it devotes its limited
24 resources to audit a dealer. Finally, Mr. Stern testified that when conducting audits under the
25 Policy JLRNA uses a "new or should have known" standard. In fact, Mr. Stern testified that he
26 holds his auditors to an even higher standard; namely, that in order to find a dealer in violation of
27 the Policy, the auditor must find "tangible" evidence in the form of a "smoking gun" that the
28 dealer knew or should of known that the vehicle would be exported.

1 **B. Whether the Policy Violates Vehicle Code § 11713.3(y)(2).**

2 57. Protestant has not carried its burden to prove that the Policy violates Vehicle Code
3 § 11713.3(y)(2).

4 58. In particular, while Protestant's expert witness, Alan Skobin, was critical of the
5 practical application of the Best Practices and Red Flags, Mr. Skobin offered no testimony that
6 the Best Practices or Red Flags implicate the Unruh Characteristics in any way, let alone that the
7 Policy requires dealers to "make further inquiries into a customer's intent, identity, or financial
8 ability to purchase or lease a vehicle based on any of" the Unruh Characteristics.

9 59. Moreover, businesses have the right to exclude persons who would disrupt or
10 interfere with their operations as long as the basis of the exclusion is not arbitrary. The Best
11 Practices and Red Flags are not based on any of the characteristics in the Unruh Act and they are
12 not arbitrary. They are intended to be applied equally to all persons, and are based not on the
13 customer's status (e.g., national origin, citizenship, and immigration status) but on his or her
14 individual conduct (e.g., history of exporting cars, using funds of a third party to purchase a
15 vehicle, purchasing multiple motor vehicles over a short time period, and providing sales
16 information that does not match the registration information on the purchased car). The Best
17 Practices and Red Flags also serve a rational and legitimate business interest; namely, to identify
18 potential exporters and their straw buyers and thus curb the exporting of motor vehicles intended
19 for sale and operation in the United States.

20 **C. Whether the Policy Violates Vehicle Code § 11713.3(y)(3).**

21 60. Respondent has agreed that it will amend the Policy to include the language
22 specified in Vehicle Code § 11713.3(y)(3).

23 **VII. DETERMINATION OF ISSUES**

24 61. Protestant has not carried its burden to prove that the Policy violates Vehicle Code
25 § 11713.3(y)(1) or (2).

26 **VIII. PROPOSED DECISION**

27 Protestant's challenges to the Policy under California Vehicle Code §§ 11713.3(y)(1) and
28 11713.3(y)(2) are hereby overruled. Respondent, however, must amend the Policy to comply

1 with Vehicle Code § 11713.3(y)(3).

I hereby submit the foregoing which constitutes
my Proposed Decision in the above-entitled
matter, as the result of the hearing before me,
and I recommend this Proposed Decision be
adopted as the decision of the New Motor
Vehicle Board.

Dated: _____, 2017

By:

DIANA WOODWARD HAGLE
Administrative Law Judge

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067.

On March 13, 2017, I caused the foregoing document described as: **RESPONDENT’S PROPOSED FINDINGS OF FACT AND DECISION** to be served on the interested parties in this action as follows:

Halbert B. Rasmussen
Arent Fox LLP
555 West Fifth Street
48th Floor
Los Angeles, CA 90013
213-629-7400
E-mail: halbert.rasmussen@arentfox.com

New Motor Vehicle Board
1507 – 21st Street, Suite 330
Sacramento, CA 95811
916-445-1888
E-mail: nmvb@nmvb.ca.gov

☒ **BY MAIL.** I sealed said envelope and placed it for collection and mailing following ordinary business practices.

☒ **BY E-MAIL.** I served such document(s) in PDF format to the e-mail address(es) indicated above following ordinary business practices.

☒ **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 13, 2017**, at Los Angeles, California.



Colm A. Moran
Printed Name

Signature